

UNITED STATES COURT OF APPEALS April 13, 2009
FOR THE TENTH CIRCUIT Elisabeth A. Shumaker
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOSEPH P. NACCHIO,

Defendant-Appellant.

No. 07-1311
(D.C. No. 1:05-CR-00545-MSK-1)
(D. Colo.)

ORDER

Before **KELLY, McCONNELL**, and **HOLMES**, Circuit Judges.

Defendant Joseph Nacchio has filed a motion with this court requesting release pending the Supreme Court's resolution of his petition for writ of certiorari. If this court denies that request, he asks for a stay of the district court order setting his surrender date until after the Supreme Court has acted on any bail request he files with that Court.

Mr. Nacchio must establish three things in order to be released pending a decision on his petition for certiorari: 1) that he is not likely to flee or pose a danger to the community; 2) that his appeal is not for purposes of delay; and 3) that his appeal raises a substantial question of law or fact likely to result in reversal, a new trial, or re-sentencing that would not include a period of

incarceration. See 18 U.S.C. § 3143(b). Further, since at this stage of the proceedings there can be no reversal, new trial, or re-sentencing unless the Supreme Court grants the petition for writ of certiorari, the standard governing that decision must also be considered.

The parties disagree about the showing that must be made as to the likelihood of whether the Supreme Court will grant the petition. The government contends that Mr. Nacchio must show that it is likely that the Supreme Court would grant his petition. Govt. Opposition at 7-9. Mr. Nacchio, on the other hand, maintains that he must show only that there is a reasonable chance that the Supreme Court will accept certiorari. Renewed Emergency Application for Release at 9-11; Reply Br. at 2. We need not decide this question, however, because the showing as to even the more lenient standard is insufficient: Mr. Nacchio has not shown that there is a reasonable chance that the Supreme Court will grant his petition.

The renewed emergency application for release is DENIED, and we DENY the request to stay the surrender date ordered by the district court.

Judge McConnell dissents.

Entered for the Court,

A handwritten signature in cursive script, reading "Elisabeth A. Shumaker".

ELISABETH A. SHUMAKER, Clerk